

Dated: September 25, 2017



Brenda K. Martin, Bankruptcy Judge

MESCH CLARK ROTHCHILD
 259 North Meyer Avenue
 Tucson, Arizona 85701
 Phone: (520) 624-8886
 Fax: (520) 798-1037
 Email: mmcgrath@mcrazlaw.com
fpetersen@mcrazlaw.com
dhindman@mcrazlaw.com
 By: Michael McGrath, # 6019
 Frederick J. Petersen, # 19944
 David J. Hindman, # 24704
 15022-1/mbt
 Attorneys for Debtor

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF ARIZONA

In re
 BILTMORE 24 INVESTORS SPE, LLC
 (EIN 32-0407608),
 Debtor.
 Address: 5515 E. Deer Valley Dr., Phoenix, AZ 85054

Chapter 11

Case No. 2:16-bk-13358-BKM

**ORDER GRANTING DEBTOR'S
 AMENDED MOTION FOR ORDER
 AUTHORIZING PRIVATE SALE OF
 ESTATE ASSETS FREE AND CLEAR
 OF LIENS, CLAIMS AND INTERESTS**

[Approximately 5.08 Acre Multifamily Parcel at SW
 Corner of 24th Street and Highland Ave in Phoenix,
 Arizona]

Biltmore 24 Investors SPE, LLC ("Biltmore" or "Debtor"), the Debtor-in-Possession in the above-captioned Chapter 11 case, filed a *Motion For Order Authorizing Private Sale Of Estate Assets Free And Clear Of Liens, Claims And Interest* [DE 89] (the "Motion"), which was granted, after appropriate notice and a hearing, on May 25, 2017 pursuant to the Court's Order granting the Motion and approving the sale free and clear of liens, claims and interests [DE 117].

1 The Debtor filed a *Debtor's Amended Motion for Order Authorizing Private Sale of*
2 *Estate Assets Free and Clear of Liens, Claims and Interests* ("Amended Motion") [DE 152]
3 on August 14, 2017, and its *Notice of Filing Signed Amended and Restated Sale Agreement*
4 *and Escrow Instructions and of Amendment of Certain Sale Terms* [DE 162] on August 21,
5 2017, providing a fully executed copy of the Amended and Restated Sale Agreement, with
6 amended sale terms set forth therein.

7 Dave's Construction Service, Inc. filed a joinder in support of the Amended Motion
8 [DE 165] (the "Joinder"); Wanxiang International Investment Corporation ("Wanxiang")
9 filed a Response [DE 164] (the "Response"); and Spray Systems of Arizona, Inc. filed an
10 Objection [DE 166] (the "Objection").

11 After due and proper notice to creditors and parties in interest [DE 157 and 158], the
12 Amended Motion came on for hearing on August 29, 2017 where arguments of counsel
13 were heard and additional objections were made.

14 Upon consideration of the Amended Motion, the Joinder, the Response, the
15 Objection, the entire record of the case, and the oral arguments and additional objections of
16 counsel at the hearing, and for the reasons stated upon the record,

17 IT IS HEREBY ORDERED as follows:

- 18 1. Granting the Motion;
- 19 2. Overruling all objections;
- 20 3. Approving the terms of the Amended and Restated Sale Agreement;
- 21 4. Authorizing the Debtor, pursuant to the terms of the Amended and Restated
22 Sale Agreement¹ executed by the Debtor as seller and Morgan Group Development, LLC, as
23 buyer (the "Buyer"), to sell the Debtor's interest in approximately 5.08 acres of real
24 property located at the southwest corner of 24th Street and Highland Avenue in Phoenix,

25 _____
26 ¹ The Debtor filed the Amended and Restated Sale Agreement [DE 162] without redacting
identifying information of the Buyer.

1 Arizona, together with related reports, completed work, and plans, as more particularly
2 described in the Amended and Restated Sale Agreement (the "Property"), free and clear of
3 all liens, claims, rights, interests and encumbrances, with any existing liens to attach to the
4 sale proceeds in the same priority pursuant to 11 U.S.C. §363(b) and (f) unless and until
5 paid or otherwise released. Notwithstanding the foregoing, the sale approval herein does not
6 alter, amend, and/or release any lien on real or personal property that is not part of the
7 Property, including but not limited to the remaining real property owned by the Debtor;

8 5. The Amended and Restated Sale Agreement provides for certain earnest
9 money paid by the Buyer to be held in escrow. As and when the Earnest Money or any
10 portion thereof becomes non-refundable to the Buyer pursuant to the terms of the Amended
11 and Restated Sale Agreement, the Escrow Agent is directed to deliver the non-refundable
12 Earnest Money to Wanxiang pursuant to instructions to be provided by Wanxiang, with such
13 funds to be credited against Wanxiang's claim;

14 6. If the closing of the transactions contemplated by the Amended and Restated
15 Purchase Agreement are not consummated by reason of a default by the Debtor in the
16 observance or performance of its obligations or because a condition precedent to either
17 party's obligation has not been satisfied and such failure to consummate obligates the
18 Debtor, pursuant to the express terms and conditions of the Amended and Restated Purchase
19 Agreement, to return the Earnest Money to Buyer, then Wanxiang shall promptly return
20 such funds to the Buyer or interplead them into this Court pending the determination of
21 which party is entitled to such earnest money. This Court retains jurisdiction with respect to
22 any default by Debtor of the Amended and Restated Purchase Agreement, whether such
23 default is directly or indirectly caused by Debtor, including jurisdiction to order specific
24 performance concerning the Amended and Restated Purchase Agreement;

25 7. Authorizing the Debtor and Buyer to close the sale and transfer the Property to
26 the Buyer or its assigns as contemplated in the Amended and Restated Sale Agreement.

1 Although all other conditions of the Amended and Restated Sale Agreement may have been
2 met, the Buyer is not required to close the sale prior to this order becoming a final non-
3 appealable order;

4 8. Authorizing the Debtor to pay all reasonable and customary costs associated
5 with closing, including but not limited to payment of all real estate commissions, real
6 property taxes for the Property, closing costs, escrow fees, and other escrow charges, from
7 the proceeds of the sale at Close of Escrow, as defined in the Amended and Restated Sale
8 Agreement. Notwithstanding the foregoing, the Debtor is not permitted to disburse any
9 proceeds to the Debtor, its members, managers, affiliates or other related parties absent
10 further order of the Court;

11 9. Authorizing and directing the Debtor and/or Escrow Agent to pay from
12 escrow all undisputed claim amounts of Wanxiang, Spray Systems, Dave's Construction
13 and Waste Management, including the undisputed portions of the following claims:

- 14 a. The undisputed portion of Wanxiang's claim including: (i) original
15 principal in the amount of \$15,150,000; (ii) accrued contract interest
16 through April 23, 2016 in the amount of \$2,471,649.10; (iii) accrued
17 default interest through September 23, 2017 in the amount of
18 \$6,141,011.22; (iv) per diem interest in the amount \$13,861.55 from
19 September 24, 2017, provided, the Closing occurs on or before October
20 23, 2017; (v) if the Closing occurs after October 23, 2017, per diem
21 interest due after October 23, 2017 shall be calculated in accordance
22 with the Loan Documents; and (vi) attorneys' fees and costs through
23 August 31, 2017 in an amount of \$126,969.35. Debtor disputes the
24 remainder of Wanxiang's asserted claim, including claimed late fees.
25 Notwithstanding anything in this Order to the contrary, nothing in this
26 Order modifies Wanxiang's rights under the Loan Documents,

1 including, but not limited to, the rights pertaining to application of
2 payments received by Wanxiang and Wanxiang's right to assert that the
3 disputed sums continue to accrue under the Loan Documents. The
4 Debtor reserves all rights to dispute Wanxiang assertions under the
5 Loan Documents as to the disputed portion of Wanxiang's claim and
6 application of payments under the Loan Documents.

7 b. Subject to paragraph 10, the undisputed portion of Spray Systems'
8 claim including: (i) principal lien of \$306,656, (ii) interest through and
9 including 9/21/2017 in the amount of \$113,420.71; (iii) per diem
10 interest of \$151.22 per day through Closing, or if payment is not made
11 at Closing, then through the date of payment in full of the undisputed
12 portions of Spray Systems' claim; (iv) pre-petition attorneys' fees and
13 costs in the amount of \$40,429.47 and (iv) post-petition attorneys' fees
14 and costs to the extent agreed to by the claimant and Debtor. Debtor
15 disputes the remainder of Spray Systems' asserted claim, including any
16 additional claimed attorneys' fees. The parties reserve all rights
17 concerning disputed claims.

18 c. Subject to paragraph 10, the undisputed portion of Dave's
19 Construction's claim including: (i) principal of \$316,477.47, and (ii)
20 interest and attorneys' fees to the extent agreed to by the claimant and
21 Debtor. Debtor disputes the remainder of Dave's Construction's claim,
22 including disputed principal, interest, and attorneys' fees.

23 d. Subject to paragraph 10, the undisputed portion of Waste
24 Management's secured claim in the total amount of \$35,873.10.

25 10. The Debtor may only pay, in whole or in part, Spray Systems' secured claim,
26 Dave's Construction's secured claim, and Waste Management's secured claim if the sale

1 proceeds remaining in escrow are at least \$3 million after the payment of such claims.

2 Beginning ninety days after entry of this order, the Debtor may request, subject to notice to
3 Wanxiang and an opportunity to object by Wanxiang, that the Court reconsider the amount
4 that must remain in escrow pending resolution of Wanxiang's disputed claim;

5 11. After payment of undisputed claim amounts, the disputed portion of any claim
6 (as well as the undisputed claim amount until paid) shall have a lien against the remaining
7 sale proceeds and the remaining property of the Debtor to the same extent, validity, and
8 priority as existed prepetition;

9 12. To the extent there are other liens that attach to sale proceeds, such sale
10 proceeds shall likewise be held in escrow unless otherwise agreed by the Debtor and
11 applicable claimant or otherwise ordered by the Court. All remaining sales proceeds that
12 might otherwise be distributed to the Debtor will remain in escrow with no funds being
13 distributed to the Debtor, its attorneys, its members, managers, affiliates or other related
14 parties until the claims of all secured creditors are resolved by agreement of the Debtor and
15 applicable claimant, or order of the Court;

16 13. Authorizing Bruce Gray, as representative of the Debtor, to execute all
17 necessary documents on behalf of the Debtor to effectuate the sale pursuant to the terms of
18 the Amended and Restated Sale Agreement and this Order; and

19 14. Authorizing the Debtor to take any and all other actions necessary to
20 effectuate the sale as contemplated in the Amended and Restated Sale Agreement.

21 **DATED AND SIGNED ABOVE.**

1 Approved as to form and content:

2 SNELL & WILMER L.L.P.²

3 By: David Ardman per authorization
4 Steven Jerome
5 Attorney for Wanxiang

6 COSTELLO LAW FIRM

7 By: David Ardman per authorization
8 Alan R. Costello
9 Attorney for Spray Systems

10 LAKE & COBB, P.L.C.

11 By: David Ardman per authorization
12 Don C. Fletcher
13 Attorney for Dave's Construction, Inc.

14 MARICOPA COUNTY ATTORNEY

15 By: David Ardman per authorization
16 Lori Lewis
17 Attorney for Maricopa County Treasurer

18 OSBORNE MALEDON

19 By: David Ardman per authorization
20 Warren Stapleton
21 Attorney for Morgan Group Development, LLC

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24
25 ² Counsel for Wanxiang's approval of the form and content of this Order merely indicates Wanxiang's
26 acknowledgement that the Order is consistent with the Court's ruling and is not, and shall not be construed, as a waiver
of any rights, including the right to appeal.